

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 82-2
WILLIAM PATTERSON)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On January 18, 1982, the Vermont State Employees' Association ("VSEA") filed a grievance with the Vermont Labor Relations Board on behalf of William Patterson ("Grievant"), supervisor at the Chittenden Community Correctional Center. VSEA alleged Grievant's three-day suspension for negligence resulting from an inmate escaping when Grievant was coordinating outdoor recreation activity violated Article 15 of the collective bargaining agreement between the State of Vermont and VSEA effective July 1, 1981 - June 30, 1982 ("Contract"), in that Grievant was not negligent and, in the alternative, that the progressive discipline requirements of the contract were not followed.

Hearings were held before the Board at the Board hearing room in Montpelier on July 30, 1982, and August 12, 1982. At the July 30 hearing, Chairman Kimberly B. Cheney and Member William G. Kemsley, Sr. were present. Member James S. Gilson was absent. The August 12 hearing was conducted in the absence of Member Kemsley with Chairman Cheney and Member Gilson present. The State was represented by Attorney Michael Seibert. Michael R. Zimmerman, VSEA staff attorney, represented Grievant.

During the August 12, 1982, hearing, Grievant withdrew his allegation that the State violated the progressive discipline requirements of the Contract.

At the August 12 hearing, the Board proposed and the parties agreed that Member Kemsley would listen to the tape of the August 12 hearing and participate in the decision with Chairman Cheney, and that if the Chairman and Member Kemsley could not agree on the resolution of the case, Member Gilson would review the record of the July 30 hearing and participate in the decision. Member Kemsley has reviewed the record of the case, and since he and Chairman Cheney were able to resolve the matter, Member Gilson did not participate in the decision.

Requested Findings of Fact and Memoranda were filed by the State on September 16, 1982. VSEA filed Requested Findings on September 16, 1982, and a Memorandum of Law on September 17, 1982.

FINDINGS OF FACT

1. Grievant has been an employee of the Vermont Department of Corrections since June of 1972. At all times relevant herein, Grievant was a permanent-status employee covered by the Contract and his workplace was the Chittenden Community Correctional Center in South Burlington, Vermont. On September 18, 1981, Grievant held the position of Correctional Counselor Supervisor A (Pay Scale 12), a position which he had held since 1977.

2. The Chittenden Community Correctional Center has both a Medium Security Unit and a House Unit. The Medium Unit is secure, with electronically-controlled doors. The House Unit is less secure with just windows separating inmates from the outside world.

3. On September 18, 1981, Grievant worked the first shift (i.e. from 7:30 a.m. to 3:30 p.m.), and was serving as Shift Supervisor. Six to seven security personnel were working that shift. On that day, Grievant was the third most senior employee at the facility. The most senior employee was Superintendent Philip Scripture, who had been Superintendent

since March of 1980. The second most senior employee was John Cannon, a five-year employee of the Department of Corrections whose normal position was Security and Operations Supervisor, but on that day was serving as Acting Assistant Superintendent.

4. During the Spring and Summer months, inmates of the facility are allowed to go outside for recreation on Mondays, Wednesdays and Fridays.

5. Since May 12, 1980, there had been a written procedure (#402) governing outside recreation (Grievant's Exhibit #1). On April 17, 1981, Grievant acknowledged he had read and understood Procedure #402 and would take the responsibility for ensuring that all his staff followed the procedure (State's Exhibit #3).

6. Procedure #402 provides that "[i]t is the duty of the shift supervisor to coordinate all aspects of the outside recreation. He is to insure that all security precautions are taken to prevent escape and/or contraband entering the facility. The shift supervisor will designate an experienced officer to be in charge of the outside recreation..."

7. Procedure #402 called for six staff members to be used in outdoor recreation: one inside-yard officer, one roof officer, three officers outside the fence, and one officer to assist the inside-yard officer when the inmates exit and enter the building. Prior to September 18, 1981, Superintendent Scripture authorized the use of five staff members for outside recreation because of manpower considerations. Consequently, two employees were stationed outside the fence, rather than the three called for by the policy.

8. Also, prior to September 18, 1981, it became the practice at the facility to use non-security personnel for outside recreation and to

allow 18 medium security inmates, rather than the 14 Procedure #402 called for, to participate in outside recreation.

9. The successive steps a shift supervisor followed in coordinating outside recreation in accordance with Procedure #402 were as follows:

a. selecting and positioning the staff (i.e. one man to roof, two men to outside fence, one man to inside fence). Included in this responsibility is designating an experienced officer (or designating oneself) to be in charge of outside recreation. The officer selected to be in charge could be the most experienced officer, but that is not mandatory.

b. ensuring that a list of eligible inmates for recreation is drawn up and submitting it to the Assistant Superintendent or the Superintendent for final approval.

c. assigning one of the staff to do a perimeter check of the outside fence, which consists of a thorough check of the entire fence and grounds inside and outside the fence.

d. ensuring that equipment needed for the recreation (i.e. baseball bats, balls, and gloves) is brought outside.

e. placing of inmates in the pool room prior to going outside, and taking a headcount of those inmates.

f. giving batons, radios, and yard keys to staff who will be conducting recreation, and sending them to their assigned posts.

g. bringing inmates into the gym area.

h. communicating with staff outside and ensuring they are at their posts and ready.

i. allowing the secure gym door to be opened to allow inmates outside.

10. On September 18, 1981, Grievant was responsible for coordinating outside recreation at the facility, and began to do so at some point before 1:00 p.m. He began to draw up a list of employees to use for recreation, but was having difficulty in coming up with enough available employees. Grievant saw Acting Superintendent Cannon in the sally port area and told him he may not be able to hold outside recreation because he was short of staff. Cannon suggested Grievant use Merle Hamilton, and Grievant accepted his suggestion, thereby completing his list of employees assigned to outdoor recreation. The employees Grievant selected, and their assignments were as follows:

a. Merle Hamilton - 14-year employee of the Department of Corrections who was then facility training officer, a non-security position. Hamilton had previously performed outside recreation duties, but this was the first time he had performed such duties in 1981. Hamilton's duties involved training new officers, but he did not train them in Procedure #402, although occasionally he would take them to observe the conducting of outside recreation. Hamilton had recently been ill. Grievant was unsure whether Hamilton had performed outside recreation before, and knew he had been ill. Grievant assigned Hamilton to one of the outside fence posts because of his lengthy experience in the Department.

b. Scott Hendrickson - two-year employee of the Department who was then a control room operator. Hendrickson had occasionally worked outside recreation before, but had only worked the roof position, a fact of which Grievant was aware. Hendrickson convinced Grievant to let him work outside the fence as a learning experience.

c. Mike Thomas - Learning Center Instructor, a non-security position. Although Thomas had been involved in outside recreation on several occasions, Grievant did not think he had ever been so involved. Grievant assigned Thomas to be the roof officer. A roof officer is situated on the roof of the facility and is responsible for stopping inmates from escaping over the roof. In the event of an escape he is to maintain visual contact with the escapee as long as possible and remain in contact with the control room operator by radio. The roof officer also needs the radio to notify the control room operator when the outside team is in position so that the inmates can be brought out of the building to begin outside recreation (Grievant's Exhibit 1).

d. John Kaye - Correctional Officer who served as a Unit Leader, a security position. Kaye had been involved in outside recreation duty numerous times before. Grievant was aware of that, and assigned him to the inside yard post.

In addition to the above four employees, Correctional Officer Gary Peryea was designated to assist Kaye when the inmates exited and entered the building.

11. Grievant gave the assignments to Hendrickson, Hamilton and Thomas while they were all together in the vicinity of the Control Room.

12. Thomas, the designated roof officer, did not know how to operate a radio and was sent to his position without one. Procedure #402 requires the roof officer to man a two-way radio.

13. Procedure #402 requires that the shift supervisor designate one of the officers assigned outside the fence to be the experienced officer in charge of outside recreation. Grievant designated neither Hamilton nor Hendrickson as officer in charge, and, never so designated anyone on September 18, 1981.

14. It is unclear precisely what happened after Grievant made functional assignments. Grievant testified that he was, at about 12:50 p.m. summoned by either the control room operator or someone in the booking office to report elsewhere in order to take care of other business. However, in an earlier hearing on the matter conducted by Superintendent Scripture, Grievant was vague about why he was called away. Also, there is no log book entry or other written verification supporting Grievant's claim. Nevertheless, we find Grievant was "called away" and also find that whatever he was "called away" to, was not business of a higher priority than outdoor recreation.

15. At some point prior to being called away, Grievant assigned one of his selected recreation staff to come up with a list of inmates eligible to participate in outside recreation. When he was called away, the list had not been submitted to him. In his absence, however, a list was made up and presented to Acting Assistant Superintendent Cannon who approved it. Cannon's approval was not unusual, as it is customary for an Assistant Superintendent to so act in the absence of the shift supervisor.

16. When he left, Grievant did not direct that outside recreation continue in his absence; neither did he direct that it not continue.

17. At about 1:00 p.m., Hamilton asked Grievant, who was standing in the control room, when recreation was going to begin. Grievant replied either that he would be out in a minute or they (referring to the inmates) would be out in a minute. Grievant did not tell Hamilton to wait for him. Regardless of whether Grievant said "he" or "they" would be out in a minute, Grievant did not make it sufficiently clear to his staff they should stop the outside recreation. This is indicated by Hamilton understanding Grievant's response to mean he should assume

his position outside the fence and await the inmate's exit from the building.

18. Soon after, Hamilton and Hendrickson were in the booking area getting batteries for their radios. After procuring the batteries, they prepared to assume their outside positions. Meanwhile, John Kaye had, with the assistance of Correctional Officer Gary Peryea, moved the inmates from the pool room into the gym. Hamilton heard a radio transmission from Kaye to the effect that the inmates were assembled in the gym and ready to go outside.

19. Hendrickson and Hamilton then proceeded to their positions on the outside of the fence by walking around the outside perimeter of the fence. As he walked to his position outside the yard fence, Hendrickson searched the ground for contraband.

20. Neither Hendrickson nor Hamilton performed a proper perimeter check pursuant to Procedure #402, which consists of a thorough check of the entire fence and grounds inside and outside the fence. Also, none of the staff assigned to recreation brought out the baseball equipment as required by Procedure #402.

21. While coordinating outside recreation, none of the involved staff considered themselves the designated leader in charge of recreation, and assumed one of their counterparts was the leader. As a result, the staff were under the erroneous impression someone was supervising the operation, when in fact no one was.

22. When Hamilton and Hendrickson reached their positions outside the yard fence, Hendrickson notified the control room operator, Phil Fitzpatrick, by radio that they were in position. Kaye told Fitzpatrick

over the radio he was ready to bring the inmates outside from the gym. At that point, Fitzpatrick opened the gym door.

23. When Fitzpatrick opened the door, he was aware Grievant was shift supervisor that day but did not know who Grievant had designated to be officer in charge of outside recreation. Normally, a control room operator opened external doors such as the gym door only by the authority of the supervisor. However, in outside recreation the situation is different because the supervisor is not always the recreation leader and the control room operator is not always told who is the designated leader of outside recreation. Fitzpatrick's action of opening the gym door without directly hearing from a supervisor in the instance when he got the two readiness checks from Hendrickson and Kaye was not considered improper by Superintendent Scripture and Acting Superintendent Cannon, and was not unusual.

24. Once the gym door opened, the 18 inmates approved for outside recreation that day went with Kaye outside into the small yard at the end of which is a gate which opens into the large yard where recreation activities actually took place. When Kaye asked one of the staff for the keys to the gate, it became apparent that no one had brought the keys outside, as called for by Procedure #402.

25. A waiting period of at least several minutes ensued, and led to inmate restlessness. During this period inmate Richard Bailey moved to the alcove near an interior window, apparently to talk with other inmates.

26. When the gate keys were obtained, Hendrickson left his position opposite the alcove prematurely, prior to all inmates moving into the

larger yard. This allowed Bailey to remain in the alcove undetected as the other inmates moved onto the ballfield in the large yard. At some point thereafter, Bailey escaped undetected from the facility.

27. Once the inmates reached the ballfield it was discovered no one had brought the athletic equipment outside. A further delay of at least several minutes ensued as a house inmate was sent inside the facility by Hamilton to get the athletic equipment which the staff should have previously brought out.

28. Grievant realized that outside recreation had been continued in his absence and without his supervision when he saw the house inmate come inside the facility to get the athletic equipment. Nevertheless, Grievant did not attempt to stop outside recreation or directly supervise it to insure compliance with security rules and regulations. He was concerned the outside recreation staff did not know what they were doing, but he did not go outside because of his responsibilities inside the facility.

29. About 10 minutes elapsed between the time that the athletic equipment was brought out and staff realized that inmate Bailey was absent from recreation.

30. The inmate was subsequently recaptured, but as a result of the escape Superintendent Scripture ordered the cessation of further outside recreation for 1981.

31. Following the escape, Superintendent Scripture asked Acting Assistant Superintendent Cannon to conduct an investigation into the circumstances surrounding the escape. In his report, dated September 22, 1981, Cannon concluded Grievant's "lack of involvement in the preparation and coordination of outside recreation" contributed to the escape and constituted negligence (State's Exhibit 5).

32. At all times relevant herein, the Chittenden Community Correctional Center Work Rules contained the following provision:

- 8. No employee shall engage in any type of behavior or lack of behavior which constitutes negligence...

The Rules further provide that infraction of this rule can lead to dismissal. Grievant was aware of that rule, and aware he could be dismissed for violating it (State's Exhibits 1, 2).

33. Subsequent to Cannon's report, Superintendent Scripture conducted a hearing, after which he suspended Grievant without pay for three workdays (i.e., October 6, 1981, October 7, 1981, and October 8, 1981). In the letter of suspension, dated October 5, 1981, Scripture specified the reasons for his action against Grievant as follows:

For the following reasons:

- #8 No employee shall engage in any behavior or lack of behavior which constitutes negligence...

To wit: On September 18, 1981, you were the Shift Supervisor, who was responsible for the outside recreation detail. You selected employees and made post assignments, however, you failed to execute your responsibilities of 'coordinating' the activity as outlined in procedure #402 for outside recreation.

You failed to:

- #1 Insure the fence and yard were searched prior to the residents going outside.
- #2 Assign an experienced officer to be in charge of the detail.
- #3 Assign a staff person to handle the keep (sic).
- #4 Assign a staff person to bring out the athletic equipment.
- #5 You posted Michael Thomas on the roof without a radio.

Because you failed to make these specified functional assignments the staff operated on false assumptions and in an extremely unorganized manner. This disorganization contributed, in part, to inmate Richard Bailey escaping.

This lack of leadership is inexcusable from the standpoint of standards of performance established by this Department.

(Grievant's Exhibits 3, 4)

34. At all times relevant herein, Article 15 of the contract provided, in pertinent part, as follows:

1. The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:

- a. act promptly to impose discipline within a reasonable time of the offense;
- b. apply discipline with a view toward uniformity and consistency; and
- c. impose a procedure of progressive discipline...

The parties agree that there are appropriate cases that may warrant the State bypassing progressive discipline or applying discipline in differing degrees so long as it is imposing discipline for just cause.

7. The appointing authority or his authorized representative may suspend an employee without pay for disciplinary reasons for a period not to exceed 10 workdays. Notice of suspension with specific reasons for the action, shall be in writing...

(Grievant's Exhibit 9)

OPINION

The issue before us is whether the three-day suspension of Grievant should be upheld. Article 15 of the Contract requires that discipline be imposed for just cause. The Contract further requires that letters of suspension contain "specific reasons for the action". Article 15, Section 7.

Grievant was suspended for negligence in failing to coordinate outside recreation as outlined in facility Procedure #402, which resulted in the staff operating on false assumptions and in an extremely disorganized manner which contributed, in part, to inmate Richard Bailey escaping. Specifically, Grievant was charged with: 1) failure to ensure the fence and yard were searched prior to the residents going outside; 2) failure to assign an experienced officer to be in charge of the detail; 3) failure to assign a staff person to handle the key; 4) failure to assign a staff person to bring out the athletic equipment; and 5) posting Michael Thomas on the roof without a radio.

Grievant argues that as he progressed through the grievance procedure, the nature of the charges against him subtly changed. Grievant maintains that since the hearing officers during the grievance process concluded that Grievant had a valid excuse for the specified charges against him, the Board should reject the State's attempt to modify the suspension letter and hold Grievant's suspension cannot stand because it is improper to impose discipline for something not specified in the suspension letter; and Grievant had an excuse for not doing the things charged in the suspension letter.

We agree with Grievant that the Board, in reviewing suspensions of State employees, must not look beyond the reasons given by the employer in the suspension letter for the action taken. Grievance of Swainbank, 3 VLRB 34 (1980). Grievance of Erlanson, 5 VLRB 28 (1982).

However, we reject Grievant's implication the Board is somehow bound by the conclusions reached by hearing officers. As specified in the Board's Rules of Practice (Section 11.17), all hearings before the Board are de novo.

We turn now to consideration of whether the reasons given are supported by a preponderance of the evidence, and, if so, whether Grievant's actions constitute just cause for suspension.

Initially, we point out that the specified charges against Grievant allege violations of Procedure #402, the facility outside recreation policy. Grievant understood Procedure #402 and realized he had the responsibility of ensuring that all his staff followed the procedure. Further, he was on clear notice negligence in the performance of his duties could result in discipline up to dismissal. The main question before us then is whether Grievant, in fact, was negligent.

"Negligence" taken in its ordinary meaning connotes a failure to do what a reasonably prudent man in Grievant's circumstances would do to accomplish his job mission, and means both a failure to act as well as an affirmative act taken which adversely affects the functions of the agency. Grievance of Swainbank, *supra*, at 47. Grievance of Deforge, 3 VLRB 204, at 219 (1980).

The facts indicate that the violations of procedure specifically charged against Grievant did occur. Grievant did not assign an

experienced officer to be in charge of outside recreation. The staff proceeded to conduct outside recreation, assuming one of their counterparts was the designated leader. Several violations of procedure resulted, contributing to the escape. The staff failed to bring the key out to allow inmates to move into the recreation yard causing a waiting period of at least several minutes which led to inmate restlessness. The staff did not bring out baseball equipment which resulted in a further delay of at least several minutes with the inmates milling around. The general confusion and the manner in which the recreation procedure was conducted contributed to an inmate escaping undetected.

The two other violations of procedure charged against Grievant in the carrying out of outside recreation that day also occurred. First, Grievant posted Richard Thomas on the roof without a radio, allowing Thomas to man his position without ability to carry out one of his main tasks specified in the procedure; notifying the control room of the whereabouts of an escaped prisoner. Second, the staff failed to do a proper perimeter check pursuant to Procedure #402, creating the potential for contraband to be placed inside the fence for the inmates' use.

Nonetheless, Grievant argues his failure to perform or assign these duties does not indicate negligence, since he was called away to do other business before he was fully able to perform these duties and coordinate the outside recreation, and he acted reasonably in assuming the recreation procedure would not continue in his absence.

Grievant maintains that given the fact that three members of his team were experienced in outside recreation (i.e. Hendrickson, Kaye, Hamilton) and were therefore familiar with the requirement of Procedure

#402 that outside recreation be carried out under the direct supervision of a shift supervisor, then Grievant cannot be faulted for assuming the procedure would stop in his absence. Grievant's argument is deficient upon a closer review of the facts which indicate his negligence.

When Grievant was called away, he had selected a recreation team and assigned them positions. Of the four members of the team, only one (i.e. Kaye) was experienced in the function he was to perform. Thomas and Hendrickson were assigned to the roof and the outside fence respectively, positions they had not previously held. Hamilton had done outside recreation in past years, but this day was the first time that year he had performed those duties. Grievant was aware of the inexperience of the staff, yet failed to account for this when he was called away. The situation called for exercise of more than ordinary caution. Grievant could not reasonably assume this inexperienced staff would know what to do when he was called away. It would have been reasonable for him to do one of two things: either assign one of the staff to be the designated officer in charge of recreation to ensure proper procedure was followed or explicitly order a halt to the procedure until he returned.

He did neither. Grievant could have designated a leader when he assigned the staff their positions; in fact, that would have been the proper time to do so. Instead, he assigned no one but left the staff with the erroneous impression one of their counterparts had been assigned. Grievant also did not explicitly order a halt to the procedure. That he did not make it sufficiently clear to his staff they should stop the

outside recreation until he returned is indicated by Merle Hamilton understanding Grievant's response to a question regarding when recreation would start to mean Hamilton should assume his position outside the fence, and await the inmates' exit from the building.

Consequently, the staff was under the erroneous impression someone had been designated leader and continued with the procedure. Due to their inexperience, proper procedure was not followed. Outside recreation was carried out in a disorganized manner, contributing to an inmate's escape.

Grievant argues he is being held to a strict liability test; that he is being held strictly accountable for the actions of those under his supervision. We do not subscribe to a strict liability test in the sense that a supervisor can be held responsible for a subordinate short-circuiting a procedure knowingly and deliberately.

Here, the disorganized way outside recreation was conducted and the resulting escape was caused by a mixture of inexperienced subordinates operating contrary to procedures and Grievant's failure to ensure the subordinates were well organized and fully aware of the procedures. While the subordinates are partly at fault here, Grievant must bear responsibility, due to his seniority, knowledge of the procedure, and supervisory status. He was negligent in neither designating a recreation leader nor ordering the procedure to stop. Given his awareness of the inexperienced staff under him, he failed to act reasonably. We, thus, conclude the reasons given in the suspension letter are supported by a preponderance of the evidence.

The remaining question before us is whether there was just cause for suspending Grievant because of his negligence. The Contract does not define just cause, but we recognize the misconduct required to be demonstrated in order for a suspension to be upheld is less serious than that required to uphold a dismissal. Grievance of Erlanson, supra. Grievance of Allen, 3 VLRB 143 (1980). Grievant's actions demonstrate an apparent disregard for important security procedures and contributed to an inmate's unobserved escape. We are aware the Contract [Article 15(1)(b)] requires uniformity of discipline and have considered the punishment imposed here in the light of similar cases. c.f. Grievance of Swainbank, supra; Grievance of Goddard, 4 VLRB 107 (1981). We believe management's actions in suspending him for three days was an appropriate penalty. This was an appropriate instance to bypass the first two steps of the progressive discipline procedure, oral reprimand and written reprimand, given the nature of Grievant's negligence.

By upholding the suspension, we do not mean to suggest management is entirely free from fault. The evidence indicates the manner in which outside recreation was commonly carried out was neither in complete conformity with established procedure nor in adherence to proper security precautions. Procedure #402 called for six staff members to be used in outside recreation, and allowed a maximum of 14 medium-security inmates to participate in the recreation. Yet, Superintendent Scripture, without changing Procedure #402 formally, authorized the use of five staff members for outside recreation, and expressed no opposition to 18 medium-security inmates participating in the recreation. Also, it was common practice at the facility to use non-security employees

to perform this security function. Further, as was the case here, the control room operator was not always kept apprised of who was the designated recreation leader and was permitted to open the door allowing inmates outside without directly hearing from a supervisor. If the control room operator here had been required to open the door only when he got the approval of either the shift supervisor or the designated recreation leader, the inmates would not have been let outside since Grievant was absent and a designated leader had not been selected. In spite of these defects in top management's security practices, though, Grievant's supervisory position still put him in position to take steps to compensate for these deficiencies and ensure recreation was carried out properly.

ORDER

Now, therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

The Grievance of William Patterson is DISMISSED.

Dated this 20 day of October, 1982, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney
Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.
William G. Kemsley, Sr.

*Appeal to Sup. Ct.
Dismissed by Sup
Feb 83*